

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:

D. GARY BARNHART,

Respondent.

HUDALJ 93-2034-DB

Decided: November 17, 1993

Robert H. Martin, Esq.
For Respondent

Bryan Parks Saddler, Esq.
For The Department

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

INITIAL DETERMINATION

Statement of the Case

This proceeding arose pursuant to 24 C.F.R. § 24.100 *et seq.* as result of an action taken by the Associate General Deputy Assistant Secretary for Housing-Federal Housing Commissioner, James E. Schoenberger, of the U.S. Department of Housing and Urban Development("HUD") on April 9, 1993, proposing to debar D. Gary Barnhart ("Respondent"). If debarred, Respondent would be prohibited from participating in primary covered transactions and lower-tier covered transactions as either a participant or principal at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD. HUD proposed to debar Respondent for a period of three years from the date of the notice. Further, Respondent was temporarily suspended from participation in such transactions and contracts pending final determination of this matter. This action taken by HUD is based on Respondent's conviction for violation of 18 U.S.C. §§ 1014 and 3. Respondent

requested a hearing on the proposed debarment by a letter dated May 14, 1993 ("Appeal").

Because the proposed action is based solely on a conviction, the hearing in this matter is limited under 24 C.F.R. § 24.313(b)(2)(ii) to submission of documentary evidence and written briefs. An Order dated June 1, 1993, established a schedule for briefs. In compliance HUD filed its brief on July 1, 1993 ("Brief"). Respondent filed no response. An Order To Show Cause dated August 13, 1993, provided, in light of Respondent's failure to file a response, that Respondent should show cause why summary decision should not be issued in favor of HUD, and that failure to respond to the Order To Show Cause by September 20, 1993, would constitute consent to such a summary judgement. On September 20, 1993, Respondent filed a response that stated, in its entirety, "Respondent has nothing further to submit in this proceeding."¹ Respondent's response sets forth no reasons why the summary judgement should not be issued in favor of HUD.

The facts set forth in the Brief are not denied and are therefore assumed true, for the purposes of this case.² The Appeal will be treated as Respondent's position in this case.

This matter is now ripe for decision.

Findings of Fact

1. At all times material, Respondent was the president of Tomahawk Mortgage Company ("Tomahawk"). Tomahawk engaged in the mortgage banking business and made numerous residential loans which were FHA insured or VA guaranteed. Appeal at page 1.

2. In an Information filed in the United States District Court for the Western District of Missouri, Respondent was charged with a Class A misdemeanor for violating 18 U.S.C. §§ 1014 and 3. The Information charged that:

On or about October 16, 1987 at Blue Springs, in the Western District of Missouri, D. GARY BARNHART, knowing that the crime of knowingly providing a material false statement to a federally insured financial institution had been committed, did knowingly relieve, comfort and assist the offender in avoiding detection and punishment,

¹This response to the Order To Show Cause, although non responsive as to why summary judgement in favor of HUD should not be issued, is sufficient to indicate there is no consent by Respondent to such a summary decision.

²There seem to be some discrepancies between the dates set forth in the Brief and those set forth in the Exhibits attached to the Brief. There is no explanation for these differences. Accordingly, I rely on the dates as set forth in the Exhibits, which are copies of the underlying documents.

thereby becoming an accessory after the fact to the commission of said crime, all in violation of Title 18, U.S.C. §§ 1014 and 3.

Brief Exhibit A.

3. Pursuant to a guilty plea, Respondent was convicted of violating 18 U.S.C. §§ 1014 and 3 as set forth in the Information and this conviction was filed on February 20, 1993, in the United States District Court for the Western District of Missouri. Brief Exhibit B.

4. As a result of his conviction, Respondent was sentenced to imprisonment for a period of 284 days, and was fined the sum of \$3,000. Respondent was also ordered to pay the costs of his supervision upon release, and a special assessment of \$25. Brief Exhibit B.³

5. The punishment imposed for the conviction of the misdemeanor has been satisfied and Respondent is not on probation for any reason and there are no charges pending against him. Appeal page 3.

6. Respondent is employed by a company that builds and sells homes which may be financed by FHA insured loans and VA guaranteed loans. Appeal pages 3, 4

³In its Brief HUD sets forth facts as set forth in *United States v. Barnhart*, 979 F.2d 647 (8th Cir. 1992). That case, however, involved felony charges against Respondent. The appellate court remanded that case for further proceedings. That is not the case upon which the subject debarment is based. The subject debarment is based solely upon the misdemeanor conviction pursuant to Respondent's guilty plea, as described in these Findings of Fact, and I am limited to the facts as set forth in this conviction in determining the appropriateness of the subject debarment.

,7.

Discussion and Conclusions of Law

1. Respondent is subject to debarment under 24 C.F.R. Part 24.

Respondent, at material times, was founder and president of Tomahawk, which made FHA insured and VA guaranteed loans, which are HUD mortgage insurance programs. 24 C.F.R. § 24.110(a)(1)(i). Respondent is subject to debarment because, in his capacity as founder and president of Tomahawk, he is a "participant" and principal in "covered transactions". 24 C.F.R. § 24.105(m) and (p); and 24 C.F.R. § 24.110(a)(1).

2. Respondent's Conviction Constitutes Cause For Debarment.

Pursuant to HUD's regulations at 24 C.F.R. § 24.305, debarment may be imposed for the following causes:

(a) Conviction of or civil judgement for:

* * *

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person; and

* * *

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

24 C.F.R. § 24.305(a)(1),(3),(4) and (d).

HUD regulations provide that cause for debarment must be established by a preponderance of the evidence, a standard met by proof of conviction. 24 C.F.R. § 24.313(b)(3).

Respondent entered a plea of "guilty" and accordingly was convicted of violating 18 U.S.C. §§ 1014 and 3, a class A misdemeanor. The judgement was entered in the United States District Court for the Western District of Missouri. Respondent was

convicted of knowingly assisting a person who made a material false statement to a federally insured institution in avoiding detection and punishment. This conviction demonstrates a lack of business integrity, business honesty, and prudent business judgement that seriously and directly affects his present responsibility under 24 C.F.R. § 24.305(a)(4) and is a cause for debarment.

In light of the foregoing, I conclude HUD has satisfied its burden of establishing that cause for debarment of Respondent exists under 24 C.F.R. § 24.305(a)(4) and § 24.313((b)(3)).⁴

3. A three year period of debarment is warranted.

The existence of cause does not necessarily require that a respondent be debarred. Debarment is a discretionary action and it must be determined whether a respondent's conduct is serious, whether debarment is necessary to protect the public interest, and whether there are mitigating factors. See 24 C.F.R. § 24.115(a), (b), and (d). The respondent has the burden of proof for establishing mitigating circumstances. *Id.* at 24.313(b)(4). The period of debarment must be commensurate with the seriousness of the cause(s) and, if suspension precedes debarment, the suspension period shall be considered in determining the debarment period. *Id.* at 24.320(a). The period of debarment for causes such as those present in this case generally should not exceed three years. *Id.* at 24.320(a)(1).

The debarment process is not intended as a punishment; rather, it protects governmental interests not safeguarded by other laws. *Id.* at 24.115(b); See also *Joseph Constr. v. Veterans Admin.*, 595 F. Supp. 448, 452 (N.D. Ill. 1984). These governmental and public interests are safeguarded by precluding persons who are not "responsible" from conducting business with the Federal Government. See 24 C.F.R. 24.115(a).

"Responsibility" is a term of art which encompasses business integrity and honesty. *Id.* at 24.304; see also *Gonzalez v. Freeman*, 334 F.2d 570, 573 & n.4, 576-77 (D.C. Cir. 1964). Determining "responsibility" requires an assessment of the risk that the government will be injured in the future by doing business with a respondent. See *Shane Meat co. v. U.S. Dep't of Defense*, 800 F. 2d 334, 338 (3rd Cir. 1986). That assessment may be based on past acts, including a previous criminal conviction. See *Agan v. Pierce*, 576 F. Supp. 257, 261 (N.D. Ga. 1983); *Delta Rocky Mountain Petroleum Inc. v. U.S. Dep't of Defense*, 726 F. Supp. 278 (D. Colo. 1989).

⁴In its brief HUD also sets forth 24 C.F.R. § 24.305(a)(3) and (d) and contends that Respondent's conviction was covered by these provisions. HUD did not set forth any argument to justify such a finding. In light of this, and because I find Respondent's conviction was grounds for debarment under 24 C.F.R. § 24.305(a)(4), I need not reach whether Respondent's conviction was also grounds for debarment under 24 C.F.R. § 24.305(a)(3) and (d).

Because the type of conduct engaged in by Respondent, which is the cause of his debarment, justifies a period of debarment that generally should not exceed three years, 24 C.F.R. § 24.320(a)(1), HUD has the burden of proving Respondent's conduct was such as to justify increasing the three year debarment period. HUD urges a three year debarment period and does not urge increasing the three year period.

Respondent urges that the three year debarment period should be shortened because Respondent has undergone a lengthy criminal trial and 284 days of incarceration and because he was convicted of a misdemeanor rather than a felony. As discussed above, debarment is not a punishment, but rather is a way to safeguard the public interest by precluding persons who are not "responsible" from doing business with the Federal Government. Respondent's conviction of the misdemeanor evidences his lack of responsibility. The fact that the conviction was for a misdemeanor, rather than for a felony is no answer. Debarment regulations make no such distinction. *In the matter of Louis Ferris, Jr.*, HUDBCA No. 92-7590-D54 (Sept. 1, 1992).

Respondent was convicted of a misdemeanor which evidences a substantial lack of honesty and responsibility and I determine that a three year debarment is appropriate to protect the public interest and to permit Respondent to establish his responsibility.

Conclusion and Determination

Upon consideration of the public interest and the record in this matter, I conclude and determine that cause exists to debar D. Gary Barnhart from participation in primary covered transactions and lower-tier transactions as either a principal or participant at HUD and throughout the Executive Branch of the Federal Government and from participating in procurement contracts with HUD for a three year period from the date of his suspension on April 9, 1993.⁵

⁵Respondent asks that four FHA houses upon which he was working be exempted from this debarment. Such an exemption is unwarranted.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DETERMINATION issued by SAMUEL A. CHAITOVITZ, Administrative Law Judge, HUDALJ 93-2034-DB, were sent to the following parties on this 17th day of November, 1993, in the manner indicated:

Chief Docket Clerk

REGULAR MAIL:

Robert H. Martin, Esq.
Paden, Welch, Martin & Albano
311 West Kansas
Independence, MO 64050-3771

INTEROFFICE MESSENGER:

James L. Anderson, Director
Participation and Compliance Division
U.S. Department of Housing
and Urban Development
451 7th Street, N.W., #6274
Washington, D.C. 20410

Bryan P. Saddler, Esquire
U.S. Department of Housing
and Urban Development
451 7th Street, S.W., #10251
Washington, D.C. 20410

Nilda Gallegos, Docket Clerk
for Debarments and Suspensions
U.S. Department of Housing
and Urban Development
451 7th Street, S.W., #10251
Washington, D.C. 20410